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ATTORNEY FOR APPELLANT:

**MONTY B. ARVIN**  
Kokomo, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**ZACHARY J. STOCK**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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COLLIER HEARD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0704-CR-333
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE HOWARD CIRCUIT COURT  
The Honorable Lynn Murray, Judge  
Cause No. 34C01-0506-FB-162

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**August 16, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Collier Heard appeals his sentence for Class B felony possession of cocaine. We affirm.

## **Issues**

The restated issues are:

- I. whether the trial court abused its discretion in sentencing Heard; and
- II. whether his sentence is inappropriate.

## **Facts**

On January 24, 2007, Heard pled guilty to one count of Class B felony possession of cocaine. As part of the plea agreement, the State dismissed other charges pending against Heard for Class A misdemeanor possession of marijuana, Class A misdemeanor resisting law enforcement, two counts of Class B felony dealing in cocaine, and two counts of Class D felony possession of cocaine. The agreement also capped Heard's maximum possible executed sentence at ten years and required him to spend five years on supervised probation.

At Heard's sentencing hearing, he contested the accuracy of the presentence report's recitation of his criminal history and record of arrests, specifically the history he allegedly compiled in Cook County, Illinois. The probation department had difficulty obtaining this history. The report ultimately provided by Cook County listed a total of thirteen charges having been filed against Heard. Seven of those charges were filed under alleged aliases of Heard. The report reflects one 1993 conviction for misdemeanor

possession of marijuana, under an alleged alias, and a 1995 felony conviction for possession of a controlled substance, under Heard's name. Heard's father, however, whose first and last name are identical to Heard's, believed the 1995 conviction was his, not his son's. The remaining four charges from Cook County either resulted in acquittals, being "stricken off with leave to reinstate," or are listed as "judgment on bond forfeiture"; one charge against Heard was still pending at the time of sentencing. App. p. 98.

As for Heard's criminal history in Indiana, he has four convictions for Class C misdemeanor driving without ever receiving a license and one conviction for Class B misdemeanor false informing. He has been arrested for burglary, intimidation, theft, and battery, but all of those charges were dismissed. At the time of Heard's plea, he also was facing trial for two counts of Class D felony operating a vehicle as an habitual traffic violator.

At the conclusion of Heard's sentencing hearing, the trial court stated in part:

As far as aggravating is concerned, in a particular position with regard to this felony conviction that's reported in the supplement from 1995. In making my decisions today with regard to your sentence I want to make it clear that I am not taking the position that I have to give a minimum mandatory sentence because there is some question about that. But what is unquestionable, based on this data of lengthy history, is that you are no stranger to the criminal justice system. There have been plenty of contacts, although not all have been reduced to convictions. I would hardly say that it demonstrates that you have led a law-abiding life thus far. I would find that apparently you spent some time in Cook County, Illinois and then here you find yourself in Kokomo, Indiana now having committed the offense of Possession of Cocaine. . . .

Tr. pp. 23-24. In a written sentencing statement, the trial court said, “The Court finds as aggravating circumstances that the defendant has had many contacts with the criminal justice system and attempts to rehabilitate him through jail time and probation have been unsuccessful.” App. p. 100. As the sole mitigating circumstance, the trial court noted Heard’s guilty plea. The court proceeded to impose a sentence of thirteen years, with eight years executed and five years suspended to probation. Heard now appeals.

## **Analysis**

### ***I. Abuse of Discretion***

Heard committed this offense after our legislature replaced “presumptive” sentences with “advisory” sentences in April 2005.<sup>1</sup> Our supreme court recently provided an outline for the respective roles of trial and appellate courts under the 2005 amendments to Indiana’s sentencing statutes. See Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007). First, a trial court must issue a sentencing statement that includes “reasonably detailed reasons or circumstances for imposing a particular sentence.” Id. at 491. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id. Even if a trial court abuses its discretion by not

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<sup>1</sup> Heard refers in his brief to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Our supreme court has stated that the “advisory” sentencing scheme does not violate Blakely, unlike the previous “presumptive” scheme. See Anglemyer v. State, 868 N.E.2d 482, 489 (Ind. 2007).

issuing a reasonably detailed sentencing statement or in its findings or non-findings of aggravators and mitigators, we may review the appropriateness of a sentence under Rule 7(B) instead of remanding to the trial court. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007).

The court did make both oral and written statements regarding the reasoning behind the sentence it chose. In those statements, the court said it was considering Heard's guilty plea to be a mitigating circumstance and his multiple contacts with the criminal justice system to be an aggravating circumstance. However, the court did not specify the incidents comprising that history of contacts. With respect to criminal history, merely stating that the defendant has a criminal history is conclusory and, instead, use of criminal history as an aggravator must be substantiated by specific facts. Pennington v. State, 821 N.E.2d 899, 903 (Ind. Ct. App. 2005). Although strictly speaking the trial court was not referring to Heard's criminal history as an aggravating circumstance, specificity still took on added importance in the present case, where Heard disputed the accuracy of the presentence report's recitation of his arrests and convictions, particularly from Cook County, Illinois. Cf. id. at 904 (holding that although trial court should have specified incidents comprising defendant's criminal history, sentencing statement was adequate where criminal history was evident in presentence report, which trial court referred to at sentencing and to which defendant had no objection). It would have been better in the present case if the trial court had made more explicit and detailed findings regarding the arrests and convictions it believed properly attached to Heard.

Still, we do not believe a remand for the trial court to enter a more detailed sentencing statement is required here. We reiterate that the trial court did not consider Heard's "criminal history" to be an aggravating circumstance, only his history of contacts with the criminal justice system, which would include both arrests and convictions. Although a record of arrests alone does not establish a history of criminal activity, it still is relevant in assessing a defendant's character. Pickens v. State, 767 N.E.2d 530, 534 (Ind. 2002). A history of arrests reveals that subsequent antisocial behavior on the defendant's part has not been deterred even after having been subjected to the government's police power. Id.

Here, even after excluding the arrests from Cook County filed under an alleged alias of Heard's and the 1995 conviction that Heard seems to claim was actually his father's, Heard has been charged with various offenses on approximately thirteen occasions, excluding the present offense. Those charges have resulted in five convictions, albeit for four Class C misdemeanors and one Class B misdemeanor. Nevertheless, despite Heard's undisputed convictions being relatively minor in severity as compared to Class B felony possession of cocaine, the sheer number of convictions and arrests, which have accumulated nearly constantly since at least the mid-1990s, is considerable. The trial court's finding as an aggravating circumstance that Heard has had many contacts with the criminal justice system, but has not been dissuaded from further criminal conduct, is supported by the record and does not constitute an abuse of discretion.

Heard also claims the trial court erred in its sentencing statement when it said it had considered the nature and circumstances of the crime, Heard's character, and the risk of him re-offending before passing sentence. However, it is clear that the trial court did not consider these factors to be aggravating circumstances (nor mitigating circumstances, for that matter). It recited these factors as separate from the "aggravating and mitigating circumstances cited above . . . ." App. p. 100. The trial court was not required to be more specific in referring to the nature and circumstances of the crime, Heard's character, and the risk of him re-offending, because these factors did not constitute aggravating circumstances.<sup>2</sup>

## *II. Appropriateness*

Having addressed the trial court's sentencing statement, we now consider whether Heard's sentence is inappropriate under Rule 7(B) in light of his character and the nature of the offense. Turning first to the nature of the offense, there is nothing in the record to indicate that there was anything egregious about Heard's possession of cocaine, or anything that would tend to justify or excuse it. The nature of Heard's offense here is neutral, i.e. warranting a sentence neither below nor above the advisory.

Turning to Heard's character, we are troubled that his nearly constant interaction with the criminal justice systems of Illinois and Indiana over the past ten years, taking

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<sup>2</sup> Heard also contends the trial court erred in not giving more weight to his guilty plea as a mitigating circumstance. However, the weight a trial court chooses to give to a particular aggravator or mitigator is not reviewable on appeal. Anglemyer, 868 N.E.2d at 491. In the Facts section of his brief, Heard also refers to having paid \$118 per month in child support to two children and his request to the trial court that it consider hardship to his dependents as a mitigating circumstance. The trial court did not note hardship to Heard's dependents as a mitigating circumstance, but Heard does not claim on appeal that the trial court abused its discretion in failing to do so.

into account only those arrests and convictions that Heard apparently does not dispute, failed to dissuade him from committing the present crime. Regarding Heard's guilty plea, such a plea may be given positive weight in considering a defendant's character. See Gibson v. State, 856 N.E.2d 142, 149 (Ind. Ct. App. 2006). Heard, however, received a very significant bargain in exchange for his plea, namely the dismissal of pending charges for two Class B felonies, two Class D felonies, and two Class A misdemeanors, and a cap on executed sentencing time of ten years. Additionally, as reflected by Heard's statements to the probation officer preparing his presentence report in which he appeared to deny that he committed this crime, his full acceptance of responsibility for his actions is suspect. Where a defendant receives a direct, substantial benefit by pleading guilty and his or her remorse is debatable, a guilty plea is entitled to at best minimal mitigating weight. See Payne v. State, 838 N.E.2d 503, 509 (Ind. Ct. App. 2005), trans. denied. That is the case here. In sum, Heard's negative character as reflected by his extensive prior contacts with the criminal justice system is enough to warrant a total sentence three years above the advisory for a Class B felony, and an executed sentence falling two years below the advisory. His sentence is not inappropriate.

### **Conclusion**

Any alleged deficiencies in the trial court's sentencing statement either do not exist at all or do not warrant a remand for resentencing. Additionally, Heard's sentence is not inappropriate. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.